



**FEDERAL ELECTION COMMISSION**

Washington, DC 20463

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**MEMORANDUM**

**TO:** The Commission

**FROM:** Kathleen Guith *K. Guith*  
Acting Associate General Counsel for Enforcement

William Powers *WP*  
Assistant General Counsel

**FILE:** MUR 6761 (Kenneth A. "Buddy" Barfield)

**SUBJECT:** Intent to Name and Notify Additional Respondents –  
72-Hour No Objection Memo

**I. INTRODUCTION**

On May 19, 2015, the Commission found reason to believe that Kenneth Barfield knowingly and willfully violated 52 U.S.C. §§ 30102(b), 30102(c), 30114, 30116, 30122, and 30125(e) by misappropriating approximately \$1.2 million from Dewhurst for Texas (the "Committee" or "DFT"),<sup>1</sup> the authorized campaign committee of David Dewhurst for his 2012 Senate candidacy in Texas. The information available to the Commission at that time appeared to show that Barfield was solely responsible for the misappropriations and he had already pleaded guilty to a criminal violation of the Federal Election Campaign Acts of 1971, as amended (the "Act") stemming from the same events.<sup>2</sup> We informed the Commission, however, that we would seek additional information about the events

Absent objection, the Office of General Counsel intends

<sup>1</sup> Certification, MUR 6761 (Kenneth A. "Buddy" Barfield) (May 21, 2015); see 52 U.S.C. §§ 30102(b) (commingling); 30102(c) (recordkeeping), 30114 (personal use of campaign funds), 30116 (excessive contributions), 30122 (contributions in the name of another), 30125(e) (soft money ban).

<sup>2</sup> On February 27, 2015, Barfield entered a guilty plea that included three counts of embezzlement of funds contributed to a federal candidate (2 U.S.C. § 439(a)(b) (now 52 U.S.C. § 30114)) and was sentenced to eighty-seven months in prison and three years of probation, and ordered to pay \$2,940,821 in restitution.

1 to notify these three additional parties of the potential violations described below and provide  
2 them with an opportunity to respond.

## 3 4 **II. DISCUSSION**

5  
6 Although our investigation is still ongoing, to date we have obtained information that  
7 demonstrates that Dewhurst may have been testing the waters for several months prior to  
8 declaring his candidacy, and that this activity was both unreported and paid for with excessive  
9 contributions from Barfield and his consulting company, AGC, and Dewhurst's state committee,  
10 David Dewhurst Committee ("DDC"). Further information shows that Dewhurst privately made  
11 the decision to run for Senate as early as May 3, 2011, and communicated that decision to  
12 several key supporters at that time; consequently, he may have been required to file his  
13 Statement of Candidacy before July 19, 2011, the date he filed with the Commission. Finally,  
14 documents confirm that Theresa Wheatley, an employee of AGC, knowingly permitted her name  
15 to be used to effect a contribution in the name of another. Accordingly, we believe that the  
16 Committee, Dewhurst, and Wheatley should be notified of the respective potential violations  
17 suggested by the record before the Commission and provided an opportunity to respond.

### 18 19 **A. Dewhurst for Texas**

20  
21 Documents reflect that testing the waters activities, and later  
22 campaign services, were paid for by Barfield or his consulting company on behalf of the  
23 Committee and that the Committee knowingly accepted, and failed to report, these payments as  
24 receipts or disbursements. These activities included, but may not be limited to, a survey focused  
25 exclusively on Dewhurst's viability as a U.S. Senate Candidate conducted from April 25-27,  
26 2011, by Baseline & Associates, a Texas-based opinion research firm. Because the survey  
27 questions were focused exclusively on Dewhurst's viability in the U.S. Senate race, the survey  
28 clearly indicates that the Committee was engaged in testing the waters activity. Invoices reflect  
29 that the cost of the survey was \$38,600. Barfield appears to have paid the invoice from an AGC  
30 account, but he may have received funds to pay the invoice from DDC, the Dewhurst state  
31 committee. The Committee appears to have knowingly accepted this excessive in-kind  
32 contribution from Barfield, AGC, or DDC, and did not disclose it on the appropriate disclosure  
33 report filed with the Commission, which was the 2011 October Quarterly Report.

34  
35 Moreover, an email dated April 18, 2011, reflects that the Committee engaged "Michael  
36 Toner as an FEC attorney," and paid him \$3,500 per month as outside counsel. A later email  
37 dated May 10, 2011, reflects that Toner approved a fundraising script for Dewhurst that may  
38 have been used for testing-the-waters activity. The Committee failed to report payments for any  
39 such services provided in the April - May 2011 timeframe.

40  
41 Finally, emails reflect that Mark Sanders and Third Coast Consulting worked on setting  
42 up a super PAC and developing opposition reports on declared U.S. Senate candidates from  
43 Texas between May and July, 2011; that James Bognet worked as the Dewhurst for Texas  
44 campaign manager in June 2011; and that David Carney and Norway Hill provided opposition  
45 research to the Committee during the March - June, 2011 timeframe. The Committee failed to  
46 report any expenditures or receipts in connection with these services.

1 Accordingly, it appears that the Committee may have violated 52 U.S.C. § 30116(f) by  
2 knowingly accepting excessive, in-kind contributions from Barfield, AGC, or DDC, and  
3 52 U.S.C. § 30104(b) by failing to report those in-kind contributions in its disclosure reports  
4 filed with the Commission.

5  
6 **B. David Dewhurst**

7  
8 Documents include the following email exchange reflecting that  
9 Dewhurst had privately made the decision to run for the U.S. Senate as early as May 3, 2011  
10 (over two months prior to his July announcement). In response to the question of whether  
11 Dewhurst was running for Senate,<sup>3</sup> Barfield on May 3, 2011 replied, "I had a chance to talk with  
12 him last night late and he reconfirmed his desire and full intent to run and his expectations and  
13 that you and Arthur would be on the team."<sup>4</sup>

14  
15 Similarly, a June 18 e-mail to Dewhurst's wife states,

16  
17 Patricia,

18  
19 I just spoke with your husband, and I am so excited to hear that he is going to run  
20 for Senate after all. David said that you check email even while traveling . . . so I  
21 am emailing you this confirmation that Jim Pinkerton and I are available at 10A  
22 CT . . . to do a conference call with David and a couple of his campaign staffers  
23 he mentioned.<sup>5</sup>

24  
25 Based on these contemporaneous exchanges, it appears that Dewhurst made a decision to  
26 become a candidate as early as May 3, 2011. Accordingly, it appears he may have violated  
27 52 U.S.C. § 30102(e)(1) by failing to designate a principal campaign committee within 15 days  
28 from the date on which he crossed the line from testing the waters and became a candidate. In  
29 addition, it appears that the Committee violated 52 U.S.C. § 30103(a) by failing to file a  
30 Statement of Organization within 10 days following the 15-day period and 52 U.S.C. § 30104 by  
31 failing to file the July Quarterly disclosure report with the Commission.  
32

<sup>3</sup> See E-mail from Jon Lerner, Red Sea, LLC, to Buddy Barfield (May 4, 2011, 10:26 CST) (The email to Barfield stated, "[o]n a separate note, the Club for Growth is likely to soon endorse Ted Cruz. That makes my life more difficult, but I can manage it. It would be useful, however, to know whether Dewhurst will have a campaign, and whether I will be involved with it.")

<sup>4</sup> See E-mail from Buddy Barfield to Jon Lerner, Red Sea, LLC (May 4, 2011, 12:12 CST).

<sup>5</sup> See E-mail from James Pinkerton to Jim Woodhill, copy to Patricia Dewhurst and Amanda Gross (June 18, 2011, 7:04 CST). See also E-mail from Jim Bognet to Enrique Marquez (June 23, 2011, 9:13 CST) (discussing the content of a letter that appears to be contemplating an announcement of his candidacy).

**C. Theresa Wheatley**

As noted in the First General Counsel's Report, Wheatley contributed \$5,000 in her name to the Committee using funds that Barfield transferred to her personal bank account. Wheatley was not originally notified because her level of involvement was not clear based on facts alleged in the complaint. Information reflects, however, that Wheatley personally caused the transfer of funds to her own bank account from AGC before then making the contribution. Thus, the record supports that Wheatley knowingly permitted her name to be used to effect a contribution in the name of another, in violation of 52 U.S.C. § 30122.

**III. ADR MATTER**

At the same time that the Commission approved an investigation related to Barfield in MUR 6761, the Commission also voted to transfer to the Office of Alternative Dispute Resolution, a *sua sponte* submission filed by Dewhurst for Texas (designated Pre-MUR 561) and RR 13L-36, both of which concerned the Committee's liability stemming from Barfield's embezzlement. In ADR 760, an agreement reached with the Committee is pending before the Commission. The facts at issue in the ADR matter stem primarily from the Committee misreporting of financial activity, which was caused by Barfield's embezzlement and subsequent cover-up. We believe that the facts implicated in the ADR matter are distinct from those recounted above, especially those that relate to the testing the waters activity by the Committee, Dewhurst, Barfield, and others. Nonetheless, because we may obtain additional information as a result of our ongoing investigation that may implicate the underlying issues in ADR 760, we recommend that the Commission not approve any ADR settlement with the Committee until the Committee's potential violations in MUR 6761 are resolved.

**IV. CONCLUSION**

In light of the information described above, we believe that Dewhurst for Texas, David Dewhurst, and Theresa Wheatley may have violated the Act. If the Commission does not object during the 72-hour period, we will notify the Committee, Dewhurst, and Wheatley of the additional information summarized here, and afford them the opportunity to respond to these allegations if they wish to do so. Based on the information and their response, we will then proceed with any appropriate recommendations to the Commission.